No. 2412.

# United States
# Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation,

*Plaintiff in Error,*

*vs.*

The United States of America,

*Defendant in Error.*

## BRIEF OF PLAINTIFF IN ERROR.

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## BRIEF OF PLAINTIFF IN ERROR.

I.

For convenience in reference, and in the interest of brevity, the plaintiff in error will hereinafter be referred to as defendant, and the defendant in error as plaintiff.

II.

### STATEMENT.

This is a Writ of Error sued out by San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, the plaintiff in error, defendant below, to

review a judgment rendered against it in the District Court of the United States for the Southern District of California, Southern Division, at the Term A.D. 1913.

III.

## ORDER CONSOLIDATING CASES.

Case No. 106 Civil, S. D., was by order of court, based upon the stipulation of the parties, consolidated with Case No. 243 Civil, S. D., and as thus consolidated, the two cases were tried together. [Tr. p. 73, *et seq.*]

IV.

## STATEMENT OF NATURE OF CASE.

Each of the cases mentioned, and each of the separate counts or causes of action therein set forth, was and is grounded upon an Act of Congress entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Employees therein," approved March 4th, 1907, (34 U. S. Stats. at Large, p. 1415), and commonly known as the "Hours of Service Act."

The complaint in case No. 106 declared upon five separate counts or causes of action, and the complaint in case No. 243 upon twenty-two separate counts or causes of action. The fifth cause of action in case No. 106 was dismissed by request of the plaintiff.

The case was tried before the court, and a jury,

upon an agreed statement of facts, reinforced by the oral testimony of a witness produced by and on behalf of the plaintiff. At the close of the trial the court, on its own motion, peremptorily instructed the jury to find in favor of the plaintiff on each count of the complaint in each case (Nos. 106 and 243), except the fourth count or cause of action in the complaint in case No. 106, upon which they were directed to find in favor of the defendant. A verdict was returned accordingly.

Thereafter, at the said term, the court pronounced judgment that the defendant pay a penalty of one hundred dollars ($100.00) on each of the following causes of action in case No. 243 (S. D.), namely: Causes of action numbers 1, 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22; that the defendant pay a penalty of one hundred fifty dollars ($150.00) on each of the following causes of action in case No. 243 Civil (S. D.), namely: Causes of action numbers 3, 4, 5, 6, 7 and 8; that the defendant pay a penalty of one hundred fifty dollars ($150.00) on each of the following causes of action in case No. 106 Civil (S. D.), namely: Causes of action numbers 1, 2 and 3; and that the defendant pay the costs in case No. 106 Civil (S. D.), in case No. 243 Civil (S. D.), and in the consolidated numbers 106 and 243 Civil (S. D.)

Judgment was entered accordingly against the defendant and in favor of the plaintiff, for a total of two thousand nine hundred fifty dollars ($2,950.00),

together with costs and disbursements taxed at seventy-one dollars and twenty cents ($71.20).

Thereafter the defendant timely filed its motion for a new trial, which motion was denied. Defendant brings its Writ of Error.

V.

## ASSIGNMENTS OF ERROR BY DEFENDANT.

I.

The Trial Court erred in instructing the jury as follows:

"In the two cases, gentlemen of the jury, of the United States of America against San Pedro, Los Angeles & Salt Lake Railroad Company—one of them is numbered 106 and the other 243—which, by reason of their consolidation, have been tried together, the facts are agreed upon. There is no controversy but that in all of these cases mentioned in the complaint—both complaints—the employees named in each count were permitted to remain on service for periods longer than those allowed by the statute. In each case the defendant has sought to justify the detention or the allowing of these employees to remain on service. The facts are agreed upon, and hence it is a matter of law for the Court to determine. And upon these agreed facts I shall hold, and do hold, as matter of law, that none of these defenses to any of these causes of action, except the fourth cause of action in complaint number 106, is good. The Court therefore instructs you—and it

is your duty to obey the instructions of the Court—to find in favor of the plaintiff on each count of the complaint in each case except the fourth count or the fourth cause of action in the complaint in case 106, and on that cause of action you will return a verdict in favor of the defendant. Submit the form of verdict to the jury, and let one of your number be selected as foreman and let him sign the verdict."

II.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the first cause of action in case 106.

III.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the second cause of action in case 106.

IV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the third cause of action in case 106.

V.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 1st cause of action in case 243.

VI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 2nd cause of action in case 243.

VII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 3rd cause of action in case 243.

VIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 4th cause of action in case 243.

IX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 5th cause of action in case 243.

X.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 6th cause of action in case 243.

XI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 7th cause of action in case 243.

XII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 8th cause of action in case 243.

XIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 9th cause of action in case 243.

XIV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 10th cause of action in case 243.

XV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 11th cause of action in case 243.

XVI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 12th cause of action in case 243.

XVII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 13th cause of action in case 243.

XVIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 14th cause of action in case 243.

XIX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 15th cause of action in case 243.

XX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 16th cause of action in case 243.

XXI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 17th cause of action in case 243.

XXII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 18th cause of action in case 243.

XXIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 19th cause of action in case 243.

XXIV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 20th cause of action in case 243.

XXV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 21st cause of action in case 243.

XXVI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 22nd cause of action in case 243.

XXVII.

The Court erred in overruling and denying the defendant's motion for a new trial.

The defendant in due form, and at the proper time,

excepted separately to the court's instructions to the jury directing them to find for the plaintiff on each cause of action (in the two cases) except that part of the instruction which directed a finding for the defendant. [Tr. p. 111, *et seq.*]

## VI.

## COMPLAINT IN CASE NO. 106.

The complaint in case No. 106 contains five separately stated causes of action. Inasmuch as the fifth cause of action was dismissed by the plaintiff, and there was a finding for the defendant on the fourth cause of action, it will only be necessary for our purposes to consider with what briefness we may, the remaining counts, 1, 2 and 3.

It is alleged in the complaint:

(a) "this action being brought upon the suggestion of the Attorney General of the United States *at the request of the Interstate Commerce Commission, and upon information furnished by said Commission*";

(b) "that said defendant is, and was during all the times mentioned herein, a corporation and a common carrier engaged in interstate commerce by railroad in the State of California".

And, stripped of all its formalities, the complaint proceeds:

## FIRST CAUSE OF ACTION.

That in violation of the Act of Congress hereinbefore mentioned, the defendant, during the twenty-four-hour period beginning at 8:00 o'clock a. m. on January 19th, 1911, at its office and station at Kelso, California, required and permitted its telegraph operator, one Grandee, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: from 8:00 o'clock a. m. to 8:00 p. m. on January 19th, 1911—or a total of twelve hours; that Kelso was at that time a continuous night and day telegraph station, and that Grandee while so required and permitted to remain on duty during said period, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

## SECOND AND THIRD CAUSES OF ACTION.

Differing only in the name of the operator and the periods of labor, the averments of the second and third causes of action are identical in every respect with those of the first cause of action. The operator named in both the second and third causes of action is one Dugan, of whom, in the second cause of action, it is averred, that he was required and permitted to be on duty as such operator from 8:00 o'clock p. m., January 19th, 1911, to the same hour A. M. on January 20th, 1911,—or precisely twelve hours; and in the third cause of action, that Dugan was required and

permitted to be on duty as such operator from 8:00 o'clock p. m. on January 20th, to the same hour a. m. on January 21st, 1911,—or precisely twelve hours.

Thus, all three counts refer to one station—Kelso—a telegraph office and station at the time continuously operated night and day—a "three-trick office", and to a continuous period of time commencing at 8:00 o'clock a. m. on January 19, 1911, and ending at the same hour A. M. on January 21, 1911,—an unbroken continuous period of forty-eight hours, of which Grandee was required and permitted to remain on duty for a continuous period of twelve hours, being the first quarter of the greater period; Dugan for a continuous period of twelve hours, being the second quarter of the greater period, and Dugan for a continuous period of twelve hours, being the last quarter of the greater period; that each, Grandee and Dugan, while so on duty, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

## AMENDED ANSWER IN CASE NO. 106.

The amended answer and justification to the first cause of action, reaverred as to the second and third causes of action, is, epitomized:

That at the time alleged, the force of telegraphers employed at Kelso consisted of an agent operator, whose hours were from 8 o'clock a. m. to 4 o'clock p. m., and two telegraph operators, whose hours were

from 4 o'clock p. m. to 12 o'clock midnight, and from 12 o'clock midnight to 8 o'clock a. m. respectively; that on January 16th, 1911, one Starkey, one of the regular telegraph operators at Kelso, whose hours were from 4 o'clock p. m. to 12 o'clock mdinight, was taken suddenly ill and became incapacitated for service; that Kelso is a helper terminal and important telegraph station continuously operated day and night; that at the time said Starkey was taken ill, there was no available operator at Kelso to replace him, and it was necessary to procure another operator and send him to Kelso, *and that as soon as possible the defendant did procure an operator, V. G. Ham, and send him to Kelso for service to take the place of said Starkey,* and said Ham began his service as soon as possible, towit, January 20th, 1911; that by reason of the facts aforesaid an emergency arose and existed which required and made it necessary and imperative to require said Grandee (first cause of action) and Dugan (second and third causes of action) to work overtime as alleged in the complaint.

Re-stated, the defense to each of the three counts mentioned, is:

(1) That Starkey, one of the regular telegraph operators at Kelso, whose "trick" was from 4 o'clock p. m. to midnight of each twenty-four hour period, became suddenly ill and unfit for duty on the 16th day of January, 1911;

(2) That at that time and place there was no available operator to take his place;

(3) That it was necessary to procure another operator and send him thither;

(4) That as soon as possible another operator, one Ham, was procured and sent to Kelso;

(5) That Ham began his service at Kelso as soon as possible, towit, January 20th, 1911;

(6) That by reason of the premises an emergency existed which justified the excessive hours mentioned in the complaint.

## VII.

## ARGUMENT IN CASE NO. 106.

Defendant contends that the trial court erred, as related to case No. 106, in giving the instruction embodied in Defendant's Assignments of Error, peremptorily directing a finding for the plaintiff on the first, second and third causes of action respectively, for the reason that the amended answer of the defendant tendered, and the proof established, a good, sufficient and complete defense and justification to the several infractions set up in said causes of action respectively.

The soundness of this claim is, of course, to be determined by the amended answer, the proof, and the provisos respectively to sections 2 and 3 of the Hours of Service Act.

The complaint (first count) charges a violation of the Act as by requiring and permitting Grandee to work 12 hours in the twenty-four hour period beginning at 8:00 o'clock a. m. of January 20th, 1911.

The defense, already stated, is: (1), that Kelso was a continuous night and day telegraph station; (2), that three operators were regularly employed thereat whose hours of service were, (first "trick"), from 8:00 o'clock a. m. to 4:00 o'clock p. m.; (second "trick"), from 4:00 o'clock p. m. to 12:00 o'clock midnight, and, (third "trick"), from 12:00 o'clock midnight, to 8:00 o'clock a. m., respectively, in each period of twenty-four hours; (3), that on January 16th, 1911, one of the operators, (Starkey), who performed the second "trick," became suddenly ill and incapacitated for service; (4), that at that time there was no available operator at Kelso to take the place of Starkey, and it was necessary for defendant to procure another operator and send him to said station; (5), that as soon as possible defendant did procure an operator, one Ham, and did send him to Kelso to replace Starkey, and did so replace him as soon as possible, towit: January 20th; (6), that an emergency existed which justified the overtime of Grandee as alleged in the complaint.

The complaint, (second count), charges a violation of the Act as by requiring and permitting Dugan to work twelve hours in the twenty-four hour period beginning at the hour of 8:00 o'clock p. m. of January 19th, 1911; and the defense pleaded thereto is the same as to the first count.

The complaint, (third count), alleged a violation of the Act as by requiring and permitting Dugan to work twelve hours in the twenty-four hour period beginning at the hour of 8:00 o'clock p. m. of Jan-

uary 20th; and the defense pleaded is the same as to the first count.

The testimony is: [Tr., p. 103, *et seq.*] That Kelso is 236 miles east of Los Angeles, and is situated in the desert between Crucero and Las Vegas; that it was, throughout January, 1911, a continuous night and day office; that Grandee and Dugan were employed as operators there, Grandee also performing the duties of agent, and both handling train orders affecting the movement of interstate trains; that Grandee's hours on January 19th, were from 8:00 o'clock a. m. to 8:00 o'clock p. m.—twelve hours; that Dugan on January 19th, 20th and 21st, was on duty from 8:00 o'clock p. m. to 8:00 o'clock a. m.—continuously twelve hours—; that he quit at 8:00 o'clock a. m. of the 20th, and went to work again at 8:00 o'clock p. m. of that day and worked until 8:00 a. m. of January 21st; that Grandee and Dugan were kept on overtime because operator Starkey became ill on the 16th; that at that time the Kelso office was under the supervision of the Chief Dispatcher at Las Vegas; that when Starkey was taken ill and the Chief Dispatcher was apprised of the fact, the latter, on the morning of January 17th, wired to the Superintendent of Telegraph at Los Angeles, he being the officer who employed operators, for a relief operator, but who did not secure an operator to take Starkey's place; that on the evening of the 17th, the Dispatcher at Las Vegas borrowed an operator in the Las Vegas telegraph office, and started him to Kelso that night on the first train after it was learned

that a man could not be had in Los Angeles; that when this train reached Lyons, a point between Kelso and Las Vegas, it was derailed and turned over, damaging the equipment, blocking the main line, and injuring fourteen passengers; that the operator (substitute for Starkey), who was on this train was directed by the Chief Dispatcher to establish a telegraph office at the wreck in order to communicate with headquarters and report conditions and progress there, and thereby enable the Dispatcher to move trains around the wreck when the line was cleared—a practice followed on all occasions, as it enables the clearing of the line much more quickly; that said operator established an office at the wreck, where he remained until relieved on the evening of the 19th by a man sent out on train No. 1 to the wreck; that the operator (substitute for Starkey) who had been working at the wreck boarded the same train on which the relief operator had arrived and went to Kelso; *that in view of the shortage of help existing at that time, the substitute operator was sent to Kelso as expeditiously as possible to take Starkey's place;* that at that time telegraph operators were scarce. The Western Union and Postal Companies were using a great many operators, and the men preferred to work in Los Angeles rather than go to desert points, such as Kelso and Otis. At that time there was difficulty in getting operators to go there. On January 16th, (Monday), on the 17th, (Tuesday), on the 18th, (Wednesday), and on the 19th, (Thursday), Grandee was required

to work twelve hours each. Dugan was required to work from 8:00 o'clock p. m. of the 16th, to 8:00 o'clock a. m. of the 17th; also that length of time on Monday; he was also required to work between the same hours from the 17th to the 18th, and again from the 18th to the 19th—so that he worked on Monday, Tuesday, Wednesday, Thursday and Friday twelve hours each. On the entire line from Salt Lake City to Los Angeles, there were at the time 71 telegraph offices, and 106 operators. Many of these were three-men offices, continuously operated day and night, and others were two-men offices. At the time no standing list of reserve operators was kept to relieve regular operators. If a man got sick and quit work, we had to trust to find some one to fill his place, or depend upon employing one for that purpose.

The foregoing is all the testimony adduced relating to Case No. 106.

It may be conceded, therefore, that the overtime, in manner and form as alleged in the complaint, was suffered, and the question is, was it justified as matter of law?

The defendant claims:

First: The illness and consequent disability of Starkey for duty on January 16th, and defendant's inability at that time to replace him with another operator, constituted a "case of emergency" within the meaning and purview of the first proviso to Section 2 of the Hours of Service Act, during which,

subject to the limitation to said proviso, the overtime complained of was lawful.

Second: That the wreck of the train on January 17th, at Lyons, on which the substitute operator was hastening to Kelso, was a casualty, or unavoidable accident, or a delay the result of a cause not known to the carrier, or its officer or agent in charge of the substitute operator at the time he left Las Vegas, *and which could not have been foreseen,* within the scope and meaning of the first proviso to Section 3 of the Act, and justified the overtime complained of.

The first proviso to Section 2, reads:

"*Provided,* That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the day time, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

The first proviso to Section 3, reads:

"*Provided,* That the provisions of this Act shall not apply in any case of casualty or unavoidable ac-

cident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

As to the first point: The Government itself appears to have recognized an *emergency* resulting from Starkey's illness, since with full knowledge of the facts it has elected to sue only upon alleged violations occurring after the expiration of the time limited by the proviso to Section 2; in other words, treated as lawful the overtime of Grandee and Dugan on the 16th, 17th and 18th, and as unlawful the overtime performed subsequently, towit: on the 19th, 20th and 21st.

The uncontradicted testimony is that Starkey's illness and disability were, on the afternoon of January 16th, reported to the Chief Dispatcher at Las Vegas, the officer having jurisdiction in the premises, who, in turn, on the morning of the 17th, wired the Superintendent of Telegraph at Los Angeles, the officer concerned with the employment of operators, to furnish and send a substitute, and that not being able so to do, the Chief Dispatcher sent an operator from Las Vegas by the first train leaving that point on the evening of the 17th, *and who, but for the wreck referred to, would have reached Kelso* (distant from Los Angeles, according to defendant's official time card, 198.7 miles) *within five hours substantially thereafter, and in time to begin, after the statutory rest, Starkey's trick, which began at 4:00 o'clock*

*p. m. on the 18th,* and in time to render unnecessary the excessive hours worked by Grandee and Dugan on the 18th, 19th, 20th and 21st,—being the excessive hours complained of in the first, second and third causes of action in case No. 106.

It is also the undisputed testimony that there was no available operator at Kelso who could have been substituted for Starkey.

It is also the uncontradicted testimony, and must be accepted as true, that it was impossible to find an operator at Los Angeles for that purpose.

It is also the uncontradicted testimony, and must be accepted as true, that a substitute was sent to Kelso as expeditiously as possible.

It is also the uncontradicted testimony, and must be accepted as true, that but for the wreck referred to, the substitute would have reached Kelso by or before the third day of the emergency period.

It is also the uncontradicted testimony, and must be accepted as true, that on the 17th, the train bearing the substitute operator to Kelso, was derailed and turned over at Lyons, a point between Las Vegas and Crucero, its equipment damaged and fourteen passengers injured.

It is also the uncontradicted testimony, and must be accepted as true, that the substitute operator, unable to press forward on his mission by reason of said wreck, was directed to, and did, establish and maintain a telegraph office at the scene of the wreck.

It is also the uncontradicted testimony, and must be accepted as true, that the substitute operator

proceeded to and arrived at Kelso by the same train which brought the relief operator to Lyons.

Therefore it is, that the efficient and operative, nay, the direct, cause of the excessive hours of service complained of, and which the trial court held were severally violations of the Act, were the result of the wreck in question, which was *a case of casualty, or unavoidable accident*, and of delay the result of a cause not known to defendant or its officer or agent in charge of the substitute operator at the time said operator left the terminal,—Las Vegas; and which affected alike the substitute operator and the diminished staff at Kelso.

If, as stated, the excessive hours complained of were directly due to a casualty or unavoidable accident, or flowed from a delay the result of a cause etc., then by force of the provisions of the proviso to the third section of the Act, the Act itself, in its entirety, including the proviso to section 2, was tolled, and became non-operative until the arrival of the substitute operator at Kelso by the first train from the scene of the wreck.

The same question is presented here that was presented and decided by the United States Circuit Court of Appeals for the Eighth Circuit, in the case of United States of America v. Missouri Pacific Ry. Co., reported in Vol. 213 Fed. Rep., at page 169, in which that Court held that the provisions of the proviso to section 2 of the Act, which relate to telegraph operators and train dispatchers, are subordinate to and governed by the proviso to the third

section, which declares that the Act *shall not apply in case of casualty, etc.;* and we commend the reasoning of that case to this Court as determinative of the question involved in the immediate inquiry.

While the casualty in question is not set up in defendant's answer, defendant, nevertheless, under the stipulation of facts [Tr. p. 82], was permitted to make any affirmative defense under the plea filed by it in this case without the necessity of filing an amended answer; and accordingly that defense is open.

Starkey's illness, we contend, constituted an emergency cognizable by the proviso to section 2, and the wreck at Lyons, a casualty or unavoidable accident, or delay within the purview of the proviso to section 3, of the Act. The former was an emergency which authorized both Grandee and Dugan to work thirteen hours during each of three days in the calendar week beginning on Sunday the 15th; and the defendant having employed the greatest diligence in the initial stage of that emergency to provide a substitute for Starkey, and was only prevented from doing so by a case of casualty, or unavoidable accident, or delay which could not have been foreseen when the substitute left the terminal, Las Vegas, on the 17th, the second day of the original emergency—the defendant is not guilty of an offense. While the first emergency existed it became merged into an extraordinary emergency which removed entirely the application of the Act. The excess hours of service performed by each Grandee

and Dugan on the 17th, 18th and 19th, were those performed during the emergency flowing from Starkey's illness, and were lawfully performed, while those performed after that period were those performed in consequence of a casualty, etc., in respect to which the defendant was not in default. Nor was it in default in making the arrangement to furnish a substitute for Starkey.

We therefore, submit that the justification pleaded and proved by defendant forbade a recovery, and that the instruction given by the court to find for the plaintiff on each the first, second and third causes of action in case No. 106, was erroneous, and that the judgment should be reversed as to these causes of action.

## CASE NO. 243.

### I.

### STATEMENT OF NATURE OF CASE.

The complaint in this case declares upon twenty-two separate counts or causes of action, each for the violation of the "Hours of Service Act," supra; but it will only be necessary to here refer to counts three, four, five, six, seven and eight, covered by defendant's assignments of error numbered respectively, VII, VIII, IX, X, XI, XII.

As in case No. 106, the complaint contains the declaration—"this action being brought upon the suggestion of the Attorney General of the United

States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission."

This case was tried upon the pleadings, the agreed statement of facts and the oral testimony, all of which are embodied in and form a part of defendant's Bill of Exceptions.

Under the instruction of the court, embodied in defendant's Assignments of Error, the jury was directed to, and did, find in favor of the plaintiff on each of the twenty-two causes of action in this case.

## II.

## DEFENDANT'S ASSIGNMENTS OF ERROR.

The defendant's assignments of error are those hereinbefore set out in connection with case No. 106, and need not be repeated.

## III.

## THE COMPLAINT IN CASE NO. 243.

The third count of the complaint alleges a violation of the Act supra, in that the defendant, on October 3rd, 1912, on its line between Las Vegas, Nevada, and Los Angeles, California, required and permitted its conductor, Brown, to be and remain on duty as such, in connection with its train No. 1, drawn by locomotive No. 3434, engaged in interstate commerce, for a period in excess of sixteen consecutive hours.

The fourth and fifth counts are identical with the third, save that in the fourth count brakeman, Edwards, and in the fifth count, brakeman, Berringer, are involved.

The answer to each of these three counts is the usual traverse. It must not be forgotten, however, that under the terms of the stipulation embodied in the Bill of Exceptions herein, the defendant was permitted to make any affirmative defense under its plea without the necessity of reforming its answer. The fact, therefore, that it tendered no special defense by way of plea will not operate to deprive it of its special defense, if any it has succeeded in affirmatively establishing conformably to the stipulation.

The only evidence adduced touching the counts under inquiry, was the testimony of C. P. Smith, Chief Clerk of the Superintendent of defendant. Smith testified, in substance, [Tr. p. 91, *et seq.*]: Train No. 1, covered by the third, fourth and fifth causes of action in case No. 243, left Las Vegas, Nevada, October 3rd, 1912. It came from Salt Lake City, but on this Division it started at Las Vegas with its crew. It was a passenger train and its destination was Los Angeles. Its conductor was Brown, and its brakemen Edwards and Henderson. On the day mentioned, they reported for duty at 5:00 o'clock p. m., the train leaving at 5:42 o'clock p. m., the 42 minute period was devoted to preparatory work. They brought the train through to Los Angeles, having been connected with its movement

during the entire trip. They reached Los Angeles at 8:00 o'clock p. m., October 4th, when they were relieved after having been in continuous service for 27 hours.

Also: The train was not operated over defendant's line for the entire distance. Normally the train would have gone from Las Vegas to Daggett over defendant's line, from Daggett to Colton over the line of the Santa Fe; from Colton to Riverside Junction over the line of the Southern Pacific, and thence over defendant's line to Los Angeles. Defendant has joint track contracts with both the Santa Fe and Southern Pacific Companies. The train in question came over defendant's tracks from Las Vegas to Crucero, California. On account of a land slide it was detoured over the line of the Tonopah & Tidewater Railroad Company from Crucero to Ludlow, thence over the Santa Fe to Daggett, and from the last named point via the usual route.

Also: Las Vegas is 334 miles from Los Angeles. From Las Vegas to Crucero it is 129.9 miles; Crucero to Daggett 41.1 miles, and from Daggett to Los Angeles 158.6 miles. In detouring that day, the train went approximately 28 extra miles. It is a little over 25 miles from Crucero to Ludlow, and 44.2 miles from the last named point to Daggett. The train ran on schedule from Las Vegas to Crucero, and then to Daggett probably as an extra, as it was not regularly scheduled over the Tonopah & Tidewater road, or over that of the Santa Fe between the points heretofore mentioned. From Dag-

gett to Los Angeles it was Train No. 1. The employees named were under the control of the defendant from Las Vegas to Crucero and again after leaving Riverside Junction.

Also: The first division point west of Las Vegas is Otis, 4 miles east of Daggett. It is a freight and not a passenger terminal, although freight crews at that point were qualified as passenger crews. The train was delayed ten minutes at Daggett while a fresh engine crew was sent down from Otis to relieve the engine crew, but no conductor or brakemen were sent, and no effort was made to send them. We had no freight crews available at Otis when the train passed Daggett. No effort was made at San Bernardino to relieve the conductor and brakemen. San Bernardino, for overland passenger trains, is not a terminal, although it is a freight terminal. It is also a passenger terminal for local crews running between San Bernardino and Los Angeles. Those trains go to San Bernardino over the line of the Southern Pacific after leaving Riverside Junction. No effort was made at San Bernardino to relieve the crew of No. 1, though it could have been done by sending a crew from Los Angeles. The crew could have been relieved at any point by sending out a crew from Los Angeles, "provided defendant had the means to get them there."

Also: The train reached Crucero at 11:55 o'clock p. m. of October 3rd; Ludlow at 6:15 o'clock a. m. of the 4th; left Ludlow at 9:45 o'clock a. m. and reached Daggett at 11:45 o'clock a. m., reaching San

Bernardino at 4:35 o'clock p. m. on the 4th. Crucero, Ludlow and Daggett were telegraph stations handling train orders, and were open when No. 1 passed there. The train was under the direction of the Chief Dispatcher at Los Angeles, but he could not know when the train arrived at or departed from Ludlow because of wire trouble caused by weather conditions. He did know when the train passed Daggett, and that when it reached there it would be impossible for it to reach Los Angeles within the sixteen hour limit from the time it left Daggett. Despite that knowledge, no effort was made to send a relief crew to San Bernardino from either Los Angeles or Otis.

Also: The carded time of No. 1 for October 3rd and 4th, between Las Vegas and Los Angeles was 13 hours and 30 minutes. When No. 1 left Las Vegas on the night of October 3rd, it was not known that it would have to detour at Crucero. There was a delay of 1 hour and 30 minutes between Las Vegas and Crucero picking up section and bridge men to repair a land slide which had occurred between Crucero and Otis—to help clear the line for traffic. When the train left Las Vegas it was not known that it would have to pick up these men—not known until Jean, a distance of 40 miles from Las Vegas, was reached. The land slide was on the main line between Crucero and Otis. Otis was a freight terminal where freight crews are relieved. There is a difference between a passenger train crew terminal and an engine crew terminal; the former consists of a conductor and

two brakemen, the latter of an engineer and fireman. San Bernardino was not a passenger train crew terminal for through service.

Also: When train No. 1 reached Daggett, where it changed its engine crew instead of at Otis, as was usual, there were no freight crews available at Otis. They had been put in work train service, and had gone to the land slide to help clear the line. When this train reached San Bernardino, there were no freight crews there; they had been sent out in freight service prior to the arrival of this train. San Bernardino was not a passenger train crew terminal for through trains, but there were two local passenger train crews which laid over there each night; they had only one brakeman each. The through trains ran from San Bernardino to Colton over the line of the Santa Fe, but the two local crews running from San Bernardino to Riverside Junction ran over the Southern Pacific line—a different system and different roadbed from the Santa Fe. These local crews laying over at San Bernardino may have been familiar with Santa Fe rules, but so far as I know they never operated trains over that road.

Also: Train No. 1 was delayed at Crucero 55 minutes waiting for orders and pending completion of arrangements to detour over the Tonopah & Tidewater road. This delay was not known when the train left Las Vegas. It was next delayed 2 hours and 10 minutes at Crucero by reason of a bridge being washed out on the line of the Tonopah & Tidewater, and having to return to Crucero until the

same was repaired. This washout was not known when the train left Las Vegas, nor when it left Crucero. There was a further delay of 1 hour and 35 minutes between Crucero and Ludlow on account of slow orders due to light rails with which the Tonopah & Tidewater was laid, and soft track as the result of rains. We knew when we left Las Vegas that the Tonopah & Tidewater was laid with light rails, but not of the other causes. We were always held down to 15 miles an hour when detouring over that line, and we knew—that when we left Las Vegas—that was the regular thing on account of the weight of our engines. When we left Las Vegas we did not know we had to detour. Before this we had frequently detoured by way of Crucero and Ludlow. Ordinarily trains so detoured got to Los Angeles within the 16 hour period, barring unusual conditions such as obtained in this case.

Also: After No. 1 left Crucero, there was a delay between that point and Ludlow of 1 hour and 35 minutes. That did not include the 15 hour running time, and shorter running time in some places because of weakened track. When I spoke of slow orders, I meant at points at which they held the train down in some places as slow as four miles an hour by reason of the conditions which obtained. The Tonopah & Tidewater line had had heavy rains, the same as occurred on defendant's line. We did not know of or suspect these delays when No. 1 left Las Vegas. *After leaving Las Vegas, heavy rains in the hills, severe electrical storms, and storm water run-*

*ning strongly in waterways developed which were unknown and unforeseen when we left Las Vegas.*

Also: No. 1 was delayed at Ludlow 3 hours and 20 minutes because the main line of the Santa Fe was blocked by the derailment of a Santa Fe train. Train No. 1 got to Daggett at 11:45 o'clock a. m.—17 hours and 5 minutes after leaving Las Vegas—and hence beyond the 16 hour period. I have no record of any delay between Daggett and Los Angeles. *None of the delays testified to could have been foreseen when the train left Las Vegas.*

Also: None of the local crews at San Bernardino would have been sufficient to run a through train, and it would have been necessary to take a portion of both crews, to have done which would have tied up one or both of the local passenger trains until relief crews could have been sent from Los Angeles; would have required one local crew and a half to man one through train, which would have laid out both of the local trains, each of which carried mail.

Also: Before No. 1 left Las Vegas, it was known there had been heavy rains in the canyon between Otis and Crucero, but the extent of the damage was not known. It was at Jean that that train got orders to pick up section men. It was known there had been considerable damage in the canyon.

Also: So far as I know, the only place at which relief crews at that time were obtainable, was Los Angeles. We had regularly assigned crews at each terminal, and kept men for emergencies at Las Vegas

and Los Angeles, but not at San Bernardino and Otis.

Also: The defendant has had a number of land slides, but none of which tied up the road previous to this time; never before had there been a serious one. *The seriousness of this one could not have been known or appreciated when train No. 1 left Las Vegas.* The bridge encountered on the Tonopah & Tidewater, is situated about a quarter of a mile from Crucero, where the train went back until the bridge was repaired and waited there and did not go back after the bridge was repaired. Crucero was not a terminal of any kind, but simply a crossing of two railroads.

Also: Train No. 1 left Crucero at 3:00 o'clock a. m. on the 4th, and its running time, when not detoured from that point, to Los Angeles was 8 hours and 35 minutes. When detouring a train we run it part of the way over the line of some other road, and so running, you can never tell what delays will be encountered, because while it is on the foreign line, it is under the jurisdiction of its dispatchers. As matter of fact, Train No. 1 while being detoured, was laid out to give trains of the other line precedence. After train No. 1 left Crucero, and until it reached Colton, the dispatchers of defendant had no jurisdiction over it—that is, while on the Tonopah & Tidewater, it was under the jurisdiction of the dispatchers of that line, and after leaving Ludlow, and from thence to Colton, it was under the jurisdiction of the dispatchers of the

Santa Fe. At Daggett the dispatchers handle trains of both the Santa Fe and of defendant jointly. Defendant had no joint dispatchers on the Tonopah & Tidewater, nor on the Santa Fe between Ludlow and Daggett, but from Daggett to Los Angeles a different condition prevailed, there it was a joint track. Train No. 1 carried United States mail. *Las Vegas, from which No. 1 started on October 3rd, was a terminal, and the next terminal for that train was Los Angeles, and the crew of that train ran regularly from Las Vegas to Los Angeles,* and *vice versa.*

The foregoing is, in substance, the entire testimony in respect to the questions involved in the immediate inquiry. Shorn of its terminology and reduced to its simplest terms, the testimony speaks thus:

Defendant's passenger train No. 1, running between Salt Lake City, Utah, and Los Angeles, California, arrived at Las Vegas, Nevada, on October 3rd, 1912, between the hours of 5:00 o'clock and 5:32 o'clock p. m. Las Vegas was a terminal station on defendant's line. There the entire crew was changed, the outgoing train crew consisting of a conductor, (Brown) and two brakemen (Edwards and Henderson), which crew remained, and were solely concerned with and directed the movement of that train from the time it left Las Vegas at 5:45 o'clock p. m. on October 3rd, until it reached the next and final terminal—*the end of its run*—Los Angeles, at 8:00

o'clock p. m. on the succeeding day—October 4th. Including the preparatory time of 42 minutes, the crew in question had been in service 27 continuous hours in connection with that train.

Los Angeles was distant from Las Vegas 334 miles, and the train in question, as its number implies, was proceeding from Las Vegas, east, to Los Angeles, west. The schedule running time of that train between the points named was 13 hours and a half. After the train left Las Vegas (on schedule) a heavy land slide occurred on defendant's line west of Las Vegas, and between the stations of Otis and Crucero, due to heavy rains in the hills, severe electrical storms, and storm water running strongly in waterways. The land slide in question was of such character and magnitude as to put defendant's line out of commission and compel it to detour train No. 1 via the lines respectively of the Tonopah & Tidewater and the Santa Fe Companies; over that of the former from Crucero, the junction of the lines of defendant and the Tonopah & Tidewater Company, to Ludlow, the junction of the last named Company and the Santa Fe Company, and over the latter from Ludlow to Daggett. Numerous necessary and unavoidable delays were encountered in connection with the detourage over the foreign lines, as the testimony amply illustrates, but with none of which was the defendant in relation, and each of which was beyond its power to prevent; and none of which nor the necessity of detour could have been foreseen when the train left Las Vegas.

While it is true, according to the testimony, that the defendant had information that there had been rains in the canyon between Otis and Crucero, the extent of the damage occasioned thereby was not known. Indeed, the true situation did not develop until the arrival of the train at Jean, a point about forty miles west of Las Vegas, where orders were received to pick up section and bridge men to repair the slide and clear the line, and in performing which, a delay of 90 minutes was necessarily incurred. And neither the fact of the land slide, nor that a delay would be encountered at Jean, was known or foreseen, or could have been known or foreseen, when the train left Las Vegas. At Jean it was known for the first time that there was serious damage in the canyon which disabled the line.

We may be pardoned for suggesting that from the scope and wide range of the examination of the witness Smith, whose testimony we have quoted, it is evident that counsel for the Government, in their zeal to secure a conviction, went to the farthest point to wring admissions from the witness to bolster up some novel theory formed by them to overturn the adjudication with which they were confronted, and which rules this case. That this is true, we shall hereafter attempt to show. That which leads us to make the observation is this:

If the excessive hours worked by the train crew did not directly spring from, or were not in relation with one or more of the exceptions enumerated in the first proviso to section 3 of the Act, then, as mat-

ter of law, the defendant was guilty as charged in each of the three counts. If one or all of the exceptions existed, the excess hours were lawful, for the proviso provides that the "Act does not apply in any case of casualty or unavoidable accident; nor where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

Manifestly then, the examination should have been restricted to show the existence or non-existence of one or all of the happenings or causes, which, by force of the proviso, rendered the Act inapplicable and the carrier immune from prosecution thereunder. Whether, after one or more of the exceptions had set in, the carrier could have relieved the crew at one point or another, is beside the question if it was not bound to do so. Therefore, it is, that so much of the examination of the witness as related to the possibility of changing crews at some time or place during the journey, while commendatory of the zeal of counsel, was, we think, foreign to the issue presented.

The proposition here is one of fact and of law. It is in brief: Were the excessive hours performed by the conductor covered by the first count, and by the brakemen covered by the second and third counts, performed in consequence of a case of casualty or unavoidable accident, or the Act of God, or due to a delay which was the result of a cause . . . .

and which could not have been foreseen? That is the proposition and question.

It is confidently submitted that the defendant has squarely brought itself within, and is entitled to the benefits of, the exceptions, or one or more of them, declared in the third section of the Act. The evidence shows conclusively that the defendant was guilty of no fault or default or neglect which was in any wise in relation to a cause or causes, circumstance or circumstances which operated to delay the train or compel the excess hours of service complained of. On the other hand, the testimony, we venture to state, shows that the defendant exerted the highest degree of diligence and foresight that was compatible with the object aimed at and the practical operation of its road.

Just why the Court felt itself constrained to instruct for the plaintiff on these counts, we are unable to understand. In his process of reasoning he must have found the defendant guilty of some neglect that was co-operative with or itself the cause of the land slide or the resultant delay; or it may be the Court reached the conclusion that notwithstanding a justifiable delay existed, nevertheless the defendant violated the law in that it failed to relieve the crew at a terminal reached some time before or after the expiration of the 16 hour period. Upon what reasoning the Court arrived at the conclusion indicated by the instruction we are not advised, no opinion, written or oral, having been rendered.

But whatever the process of reasoning employed

by the Court or the conclusions necessarily compelled thereby, it is for us, upon the record here, to the best of our ability, to justify, if we can, the alleged infractions involved in these counts.

First: We assert that the land slide which operated to put the line of defendant out of commission, and to prevent Train No. 1 passing over it, was *a case of casualty or unavoidable accident or an Act of God,* which did not proceed or result from neglect or default of defendant, but from causes wholly beyond its power to prevent, towit: heavy rains in the hills, electrical storms and storm water running strongly in waterways, which developed after, and which were unknown, and which could not have been foreseen when the train left Las Vegas. Upon these points the testimony is positive, decisive and conclusive.

Second: There was a delay—a multiplicity of delays—after the train left a terminal—Las Vegas—the result of a cause not known to defendant or its officers or agents in charge of the train crew at the time that crew left the terminal, and which could not have been foreseen.

The testimony, positive, unimpeached and uncontradicted on these points, is:

"None of the delays I have testified to could have been foreseen when either No. 1 or No. 7 left Las Vegas." [Tr. p. 99.]

Therefore, on the ground last mentioned, if not

on that first mentioned, the verdict should have been for the defendant.

Stated otherwise, the pleadings and proof show:

(a) There was a delay after leaving *a* terminal which was the result of a cause not known when the crew left that terminal, and

(b) Which—the cause or the delay, or both—*could not have been foreseen.*

Therefore, the defendant completely justified the excessive service under these counts. To say it did not is to deprive words—the testimony—of their meaning and efficacy.

Recurring to the first point: The proviso to the third section of the Act provides:

That the provisions of this act shall not apply:

in any case of casualty
or unavoidable accident
or the Act of God. . . . .

It therefore contains four elements, any one of which when it exists, tolls the act, viz: (1), casualty; (2), unavoidable accident; (3), Act of God, and (4), unforeseen delays after leaving a terminal. The first three elements as they occur in the proviso are only separated by the disjunctive "or," except 3 and 4, which are separated by a semi-colon. Was it the intention of Congress in employing these terms, that the existence of any one of the four elements enumerated should toll the Act? We have been unable to find that this exact question has ever received exposition by the courts.

The term "accident" in the proviso is qualified by the adjective "unavoidable." The words "Act of God" imply an unavoidable happening, without human intervention. The term "casualty" is neither restricted nor qualified. "Casualty," like its synonyms, "accident" and "misfortune," *may proceed or result from negligence or other cause,* "known or unknown." (Words & Phrases Judicially Defined, Vol. 2, p. 1003.)

There is no apparent ambiguity in the proviso, nor anything therein demanding construction, unless it be claimed that the terms "unavoidable accident" control or qualify the antecedent term "casualty." Will it be claimed that Congress intended to use the words "casualty," "unavoidable accident" and "Act of God" interchangeably? If yes, the effect is necessarily to expunge the word "casualty," since a casualty may sometimes be avoidable. An "accident" is a "casualty," but there are avoidable as well as unavoidable accidents. If it was intended to qualify the word "casualty" by the succeeding terms "unavoidable accident," there was no need for the former, since it was necessarily embraced in the latter, and to expunge it in the one case and qualify it in the other, is to ignore the cardinal rule employed in the construction of statutes, which gives effect, if possible, to every word, phrase, etc. If it is a question of expansion or diminution, why not eliminate the word "unavoidable" as qualifying "accident?" That may be done with the same reason. Congress, it may be conclusively presumed,

intended by the use of the term "casualty" without restriction, to embrace all casualties, those avoidable as well as unavoidable, and there is just as much reason for this construction as there is for the other.

In the early part of this argument we took occasion to quote from the complaint the declaration prefacing the first cause of action in each complaint, namely: that the action is brought by the Attorney General of the United States *at the request and upon information furnished by the Interstate Commerce Commission.* The situation presented here, so far as it relates to causes of action 3 to 8 involved in case No. 243, is an anomalous and cheerless one for this defendant in particular, and carriers subject to the Act in general. By section 4 of the Act it is made the duty of the Interstate Commerce Commission to enforce the provisions of the Act, and all powers granted to it are extended to it in the execution of that Act.

The Commission, on June 25th, 1908, about 16 months after the approval of the Act, construing the provisions of the first proviso of section 3 thereof, promulgated the following rule in respect thereto:

*"Any employee so delayed may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."*

That rule has never been expunged, revised, recalled or modified, and is still in effect so far as it may be effective, binding alike, so far as it goes, both

the commission and the carrier. [Rule 88, Tr. 120, *et seq.*]

The prosecuting witness in this case, the entity furnishing the information upon which the action is brought, is here in derogation of its own rule, a rule with which the carrier can have no quarrel; a rule that has been a guide to its feet and a lamp to its path for more than six years. The Commission has the right to change its mind upon being persuaded that its former ruling was incorrect, but it seems to us that until that rule is changed and notice thereof communicated to the carriers affected, the attitude of the Commission in this case is ill advised and operates to impair the maintenance of that discipline on the part of the carriers, at all times essential to the enforcement of the Act in question.

*"The end of that run"* was Los Angeles; its beginning Las Vegas. The schedule time of No. 1 on October 3rd, 1912, between the points named, was thirteen and one-half hours. When No. 1 left Las Vegas, the line was clear. When it reached Jean, 40 miles west of Las Vegas, it encountered delay or causes of delay hitherto unforeseen and unforeseeable; again upon reaching Crucero; again between Crucero and Ludlow on the line of the Tonopah & Tidewater, and again between Ludlow and Daggett on the line of the Santa Fe. Every moment of that memorable journey, as the train in question slowly made its way against adverse fate and conditions, the defendant, its officers and agents relied upon and

found security in the rule of the Commission which permitted its crew lawfully to continue on duty *"to the end of that run."*

It seems to us that a decent regard for its own rule should have induced, nay, compelled, the Commission's concurrence in the defendant's course in this case. If the rule was wrong, the Commission had the right and power to change it, and thus put it in the way of the carriers to protect themselves against future exigencies of the same kind. The Commission, by force of every rule is, and very properly should be, estopped to question any act of the defendant performed in strict conformity to its rule.

But the interpretation upon which the rule is based, and the rule itself, are sound; and no other interpretation is possible. The declaration of the statute is, "nor where the delay was the result of a cause not known . . . at the time said employee left a terminal, and which could not have been foreseen." Manifestly, any delay contemplated by the proviso resulting in excess hours performed by an employee after leaving a terminal, be they one or one hundred, removed the application of the Act, and by parity of reasoning, made that lawful which otherwise was unlawful. The proviso does not in terms prescribe or fix the period during which the applicability of the Act shall be removed; in fact, the declaration, "shall not apply," etc., contains no exception or limitation. The learned and astute counsel for the Government contend, or

did contend at the argument of the case below, smashing the rule of the Commission, that the proviso should be construed to read: "This Act shall not apply until *a* terminal is reached. when the crew which has served sixteen consecutive hours on duty shall be relieved."

Does not such a construction, aside from the fact that it involves the experiment of interpolating words into the Act which its framers presumptively, designedly omitted, lead to absurdities? Does it not tend to make the Act the prey of every change in conditions, tolling it today and restricting it tomorrow, according to the will of the person or the body charged with its execution? Is it not a strained effort to make that a misdemeanor which, at the time the act was committed, is clearly not so under the plain and unambiguous terms of the Act? Under such a construction the members of a crew of a justifiably delayed train might lawfully work one hundred hours in excess service in connection with that train, if perchance there were no terminal intermediate the *run* points, while the crew of another train, similarly delayed, could only lawfully continue to work after the 16 hour period expired, up to the first intermediate terminal, if perchance there were one, at which point they must desist and abandon the train and its cargo of human freight, whether there is there a relief crew or not. This construction means that if the carrier maintain no intermediate terminal, the Act is tolled; if it does maintain one, the Act is operative. Such a con-

struction is against common sense and is unreasonable and impracticable, and is therefore to be disregarded, if perchance there is any other possible construction which comports with common sense. The delay that Congress had in mind was a delay, or casualty, or unavoidable accident occurring during the *regular* run after the employee left the initial terminal. It knew, or at least it is presumed to have known, the methods and practices of the carrier in respect to *runs* when the Act was passed; knew that a delay or casualty was as likely to attend train movement during the first ten minutes of the trip, as during the last minute of that trip. Therefore, the delay, casualty, or unavoidable accident contemplated by the statute was one which might arise at any time, and which, when it did arise, relieved the employee affected thereby, as well as the carrier, from the application of the statute. If this be not so, then we are face to face with the absurdity that the only delay, or casualty, or unavoidable accident which tolls the Act, is one which occurs during the sixtieth second of the last minute of the last hour of the 16 hour period of continuous service. Ought so narrow a construction be allowed to prevail in connection with a remedial statute, the penalties denounced by which are only incidental?

Is it not reasonable to suppose that in adopting the proviso, Congress had in mind the drastic prohibitions of the Act which furnished no leeway to the carrier in case of infirmity or calamity and that in respect to train movements the hours defined repre-

sented to the mind of Congress a fair period within which, under established usage, trains could be brought to the end of their runs, namely: a 16 hour period? But that where that could not be done because of misfortune or delay, then that the Act should not apply. What else could it have had in mind? It is expressly provided that certain calamities and certain delays shall toll the Act; and that means *something.* And what can it mean if it does not mean the run between the regular terminals? That this was the intent of Congress appears to be forcefully suggested by the words "not known, etc., when the employee left a terminal."

Under the Government's construction, the carrier which maintains a freight terminal intermediate the *run,* would also be required to have constantly on hand thereat passenger train relief crews to meet any and every possible emergency, or, if having no passenger train crews thereat, it must rob some other crew, or at its peril ship one from some distant point. The exaction of such unreasonable and drastic requirements would make for chaos and confusion and make the carrier the victim of a fate with whose adventure it was not in relation. Is it not more reasonable to suppose that the Congress intended that in every case of delay within the purview of the statute, the carrier should be permitted the exercise of a reasonable discretion calculated to relieve itself of infirmities which adventitious conditions might impose?

Train crews are assigned in advance, and to disturb or rob a single crew, might disturb all crews and thus bring about a suspension of traffic. Surely this was not a condition which Congress had in mind by the adoption of the proviso to the third section. What then is more natural to believe than that it was the intention of Congress to permit a crew starting from a terminal to remain with the train overtaken by delay, casualty, or unavoidable accident until the end of the *run*.

"Congress had the right and power to prohibit the application of all or of only a part of the provisions of the Act in cases of casualties, unavoidable accidents, or acts of God. It enacted that the provisions of this act shall not apply in any case of casualty . . . . " etc., and it made no exceptions.

The construction for which counsel for the Government contend requires the amendment of this prohibition by the interpolation of an exception, so that it will read as follows: "That the provisions of this act shall not apply . . . . nor where the delay . . . . and which could not have been foreseen, *provided*, that said employee shall be relieved from duty at the first terminal after he shall have been on duty for more than sixteen consecutive hours."

"But where the legislative body makes no exception to a general and clear declaration of its will, the conclusive presumption is that it intended to make none, and it is not the province of the Court to

do so." U. S. v. Mo. Pac. Ry. Co., 213 Fed. Rep. 173, and cases therein quoted.

"Another approved rule of construction is that a rational, sensible and practical interpretation of a statute, one which will permit the accomplishment of the purpose of the act, should be preferred to one which is unreasonable or impracticable, or that would hinder or retard the accomplishment of that purpose." Ibid.

In the last case, at page 174, the learned Judge who wrote the opinion, uses the following pertinent language, which is singularly appropriate to this case:

"There is still another rule of construction that persuades to the same conclusion. This is a suit for the collection of a penalty of $500 for a violation of this Act of Congress. The act created and denounced a new offense. A statute which creates a new offense and prescribes its punishment must clearly state the persons and the acts denounced. An act which is not clearly an offense by the expressed will of the legislative body before it was done may not be lawfully or justly made such by construction after it is committed, either by the interpolation of expressions, or by the expunging of its words by the judiciary. And as this statute not only failed clearly to denounce as an offense requiring or permitting an operator or train dispatcher to serve beyond the hours limited in section 2 in case of a casualty, an unavoidable accident, or the act of God, but positively declared that in such a case the

provisions of the act which denounced such excessive service, as an offense did not apply, the defendant may not lawfully be punished for such an act."

And *au fortiori,* when we consider that the Interstate Commission, the body entrusted with the enforcement of this Act, adopted a rule which declared that the act done in this case by defendant was lawful.

But conceding, for the purpose of this argument, the construction contended for by the Government, still we insist that under the pleadings and proof, defendant is not guilty as charged.

The testimony is that train No. 1 ran on its schedule from Las Vegas to Crucero, the junction of the line of defendant with that of the Tonopah & Tidewater [Tr., p. 92], whence it was detoured because of the land slide over the line of the Company last named. By reason of the detourage, the usual mileage of that train was increased 28 miles. The train reached Crucero at 11:55 p. m. on the 3rd. The time consumed by it up to that time was 6 hours and 15 minutes, while the members of the train crew had been on duty for 6 hours and 55 minutes. Ordinarily, trains detoured via the lines mentioned, barring unusual conditions, reached the terminal—Los Angeles—within the 16 hour period.

The train, despite the delay encountered at Jean, reached Crucero at 11:55 o'clock p. m. on the 3rd, on time. At that time the train had been out of Las Vegas 6 hours and 13 minutes, and its crew had been on duty 6 hours and 55 minutes. At Crucero

the train was detoured over the line of the Tonopah & Tidewater to Ludlow, and over that of the Santa Fe from Ludlow to Daggett. In effecting that operation, usual and unusual delays characterized it, so that it did not reach Daggett, where it again entered upon its own rails, until 11:45 o'clock a. m. of the 4th. At that hour the train had been out of Las Vegas about 18 hours, and the train crew had been on duty about 45 minutes longer, or substantially three hours beyond the 16 hour period.

The testimony is also, that although in consequence of the detour, the mileage of the train was increased by about 28 miles, and that ordinarily, in the absence of unusual conditions, the train, as detoured, would have reached Los Angeles on schedule. When the train left Las Vegas, the fact that there was a land slide, or that the train would have to detour via the lines named, was unknown and *unknowable.* When it left Crucero, the fact that it would encounter unusual delays on the lines over which it was detoured, was *unknown and unknowable.* It reached Daggett at 11:45 a. m. the 4th, and, under the warrant of the law and the rule of the Commission, proceeded to Los Angeles, where it arrived at 8:00 o'clock p. m. on the 4th.

It may therefore be successfully claimed that up to the hour the train reached Crucero, on schedule, the extended delay at Jean was without prejudice, save alone that the land slide west of that point, and the cause of that delay, compelled the train to detour.

When the train entered upon the rails of the Tonopah & Tidewater at Crucero, and later those of the Santa Fe at Ludlow, its control was surrendered to the dispatchers of those companies. It had to accept conditions as it found them. In addition to slow movement from weakened or soft track, or light rails of the Tonopah & Tidewater line, it encountered unusual delays of several hours in the aggregate due to causes beyond its control. Also on the Santa Fe line between Ludlow and Daggett like or longer delays were encountered, the result of causes also beyond its control. And it would seem that the Government claims nothing on account of delays up to and including Daggett. It does claim, however, if we apprehend the current of the testimony, that upon reaching Daggett, where the engine crew was changed, the train crew should also have been relieved in some way, somehow, and because it was not relieved at that point, or afterwards at some other point, the law was violated. And the basis of the claim that the law was infracted, is the proviso to the third section *as amended by counsel for the Government.*

Now Daggett was not a terminal or division point of the defendant, and if it was bound to provide a relief crew at that point, it was necessary for it to have assembled it at some other place, such as Otis, San Bernardino or Los Angeles, and to send it to Daggett.

The humanitarian side of the defendant is evinced by its act in relieving the engine crew at Daggett.

Is it not fair to presume that it would have furnished like relief for the train crew if it had been within its power to do so?

The first division point west of Las Vegas was Otis, four miles east of Daggett. Otis was a freight terminal and not a passenger terminal, although freight crews were qualified as passenger crews. Unfortunately, however, there were at that time no available freight crews at that place, they having been put in work service and sent out to the land slide to clear the line. [Tr., p. 96].

We infer inferentially from the trend of the testimony that counsel for the Government has claimed and will claim that while the train was being detoured over the foreign lines, the defendant knew or could have known that the train could not reach its destination within the 16 hour period, and was therefore bound to anticipate that condition and have a relief crew ready at the first available point after the train emerged from the foreign line at Daggett. The answer is, of course, if it was bound to do so, it should have done so or be amenable to the penalties denounced by the Act. Defendant, however, was adjured by the rule declared by the Interstate Commerce Commission that it did not have to provide, and need not provide, a relief crew, and that the belated crew might continue on duty *to the end of the run;* and what better authority could the defendant have had than the mandate of the body charged with the enforcement of the law?

But Los Angeles was far removed from Daggett (158.6 miles west). The dispatcher at Los Angeles, under whose immediate jurisdiction the train crew of No. 1 was, did not know when the train arrived at or departed from Ludlow, on the Santa Fe, because of trouble with the telegraph wires as a result of weather conditions. He knew, however, when the train reached Daggett, and he knew also that after it reached that point it could make Los Angeles as quickly as a relief crew could reach Daggett; and furthermore, was he not relying, as he had a right to rely, upon the rule of the Commission, *supra?* East of Daggett, while on foreign lines, the train in question was a derelict, subject to the caprice of every condition, and without ability to communicate with its own dispatcher. Who knew or could have known when it would reach its own line?

It has been claimed, and doubtless will be claimed, that although there was a failure to provide a relief crew at Daggett, still a crew should have been provided at San Bernardino. The best answer to this contention is the testimony, which shows beyond cavil the impossibility of furnishing any relief crew at that point, except by robbing the regular crews of other trains, and thus create new conditions worse than those then endured. There were no relief crews at that point, and so the original crew continued at its post of duty until the journey was accomplished.

In concluding the argument on this branch of the case, we venture the thought that if there ever was a case where a complete justification was shown under the Act, this is the case. This case, however, in view of the rule of the Commission to which we have frequently adverted, savors of persecution rather than prosecution in good faith. Moreover, the rule of the Commission is right, should be sanctioned and upheld, and the judgment on the three counts under consideration reversed.

While we have doubt as to whether the matter is the subject of an assignment, we call the court's attention to what appears to be a fatal variance between the allegations and the proof in respect to the fifth cause of action in case No. 243. It is there averred that the defendant permitted one Berringer to be and remain on duty, etc. The proof fails to show that Berringer was connected with train No. 1, or any other train on that day, or on any other day.

## IV.

### COUNTS 6, 7 AND 8 OF CASE NO. 243.

The averments of these counts are, that the defendant, in violation of the Act, beginning at 5:30 o'clock a. m. of October 4th, 1912, upon its railroad between Las Vegas, Nevada, and Los Angeles, California, in connection with its interstate train No. 7, required and permitted (6th count) Fitzpatrick, conductor, (7th count) Roberts, brakeman, and (8th count) Carter, brakeman, to remain on duty

from 5:30 o'clock a. m. of the 4th, to 6:28 o'clock a. m. of the 5th—substantially 25 hours—or 9 hours in excess of the 16 hour period.

The answer to each count is the usual traverse.

The provision of the stipulation of facts [Tr. p. 82] which permitted the defendant without amending its answer, to prove any matter of defense accruing to it, applies to each of these counts.

### Testimony and Observations Affecting Counts 6, 7 and 8.

The testimony relating to these counts may be accurately summarized thus:

Train No. 7, on October 4th, 1912, was a limited passenger train. It left Las Vegas at 6:12 o'clock a. m. of that day, and arrived at Los Angeles, the end of that run, on the next succeeding day, the 5th, at 6:28 o'clock a. m., having been on the rails 24 hours and 16 minutes. Its crew which began and continued with it until the end of the run, were those men mentioned in the counts. They went on duty at Las Vegas, the initial terminal point, at 5:30 o'clock a. m. of the 4th, and remained on duty with the train until relieved at Los Angeles at 6:28 o'clock a. m. of the 5th, having been on duty for a continuous period of substantially 25 hours.

The schedule running time of this train between Las Vegas and Los Angeles was 11 hours and 28 minutes. Like train No. 1, embraced in the preceding counts, and for the same reason, it was compelled

to detour via the lines respectively of the Tonopah & Tidewater and Santa Fe, between Crucero, the point of entry on the former, and Ludlow, the point of emergence on the latter. It arrived at Daggett at 2:50 o'clock p. m., and departed therefrom at 3:35 o'clock p. m. on the 4th, and reached San Bernardino at 3:34 o'clock a. m. on the 5th—7 hours and 3 minutes after the expiration of the 16 hour period, so far as the crew were concerned.

After arriving at Daggett, the train crew had been out of Las Vegas, counting from time they reported for duty, 9 hours and 20 minutes, and should, but for delays subsequently encountered, being those hereinafter referred to, have reached Los Angeles, the end of that run, within the 16 hour period, the schedule running time of that train between Daggett and Los Angeles being 5 hours and 35 minutes, and which, added to the 9 hours and 20 minutes, represented a total period of 14 hours and 55 minutes, or 1 hour and 5 minutes less than 16 hours—"so that had there been no delay encountered after No. 7 left Daggett, it would have gotten to Los Angeles within the sixteen hour period." [Tr., p. 98.]

The detour with its resultingly slow movement, served to lengthen the schedule between Las Vegas and Daggett by two hours and 47 minutes. This is determined by a calculation based upon the actual run to Daggett and the scheduled time thence to Los Angeles. In other words, but for the necessitated detour, the train crew should, in pursuance of

the schedule for that train, have reached Daggett about 2 hours and 47 minutes before they did arrive.

The testimony is that there were no negligent or any delays up to Daggett. The detour was accomplished as rapidly as circumstances permitted. The reason, of course, for the detour, was the continuing disablement of defendant's line, due to the unavoidable occurrence of the preceding day—the land slide—already referred to in our discussion of the previous counts, and which detour, we repeat, was accomplished as expeditiously as the circumstances and conditions attending the same permitted.

Therefore, we state, as matter of fact and of law, the defendant, in respect to the movement of train No. 7, throughout that entire trip, was guilty of no act of omission or commission, which directly or indirectly, or at all inspired or contributed to the delays which occurred after the train left Daggett, and but for which it would have reached Los Angeles within 16 hours from the time it left Las Vegas.

After the train left Daggett, it encountered certain serious delays, none of which could have been foreseen when the members of the train crew left Las Vegas, or, if you please, Daggett (not a terminal or division point) or Otis (a freight crew terminal) namely: a delay of 24 minutes (retardation below running time) between Barstow and Victorville due to a heavy wind storm; a further delay of 8 hours and 18 minutes at Hesperia by reason of the main line of the Santa Fe joint track being

blocked at Lugo by the derailment of a Santa Fe freight train caused by a car breaking in two while being pulled into a siding, thereby blocking the main line; and a further delay of 10 minutes at Lugo where the derailment occurred, by reason of the main line being blocked by the wrecking outfit having in tow the derailed car, compelling train No. 7 to run into a siding and back out again in order to get by it [Tr. p. 98, *et seq.*]; the delays in question aggregating 8 hours and 52 minutes.

It is in order at this juncture to state that the line of railroad between Daggett and Colton was owned by and in the exclusive control of, and operated by the Atchison, Topeka & Santa Fe Railway Company, but over which, subject to the direction of the dispatchers of that Company, the defendant, by contract, enjoyed "running rights" for its trains and their crews. The line may, therefore, be termed a joint one for the movement of the respective trains of the contracting parties, those of defendant being moved by and under the exclusive direction of the owning Company, the Santa Fe. The stations respectively of Barstow, Victorville, Hesperia, Lugo and San Bernardino, referred to in the testimony, are severally situated on the joint line intermediate Daggett and Colton. The defendant had no voice or participation in the actual operation of that line, and in fact, its own trains were moved over it solely under the direction of the dispatchers of the owning Company. Therefore, the defendant could not be

and was not in relation with the delays occurring on that line or the cause responsible therefor. So far as it was concerned, they were delays beyond its power to prevent, and which, manifestly, could not have been foreseen when train No. 7 left either Las Vegas or Daggett. That is the testimony. Hence they were delays after leaving a terminal which could not have been foreseen, or a casualty, or unavoidable accident, it matters not which, within the purview of the proviso of section 3 of the Act, which relieved the defendant—and the train crew—from the operation of the act, and brought into operation the rule of the Interstate Commerce Commission which permitted the crew to *continue on duty to the end of that run.*

Undoubtedly, counsel for the Government will make the same contention concerning the train under consideration, that they made, and will make, with reference to train No. 1, namely: that the defendant, after it became advised that the crew could not reach a terminal within the 16 hour period, was bound to furnish a relief crew at the first terminal reached immediately before or after the expiration of the 16 hour period, although to do so involved the sending of a crew from a distant point, namely: Los Angeles.

The testimony shows that the train reached Hesperia at 5:35 o'clock p. m., and departed therefrom at 1:35 o'clock a. m., and that the running time between that point and San Bernardino was 25 min-

utes. We therefore infer that Hesperia was east of San Bernardino about 15 miles, and that Lugo, where the derailment occurred, was between these points. The situation was such, therefore, that no relief crew, had one been sent, could have reached No. 7 until the line was cleared up at Lugo, nor until No. 7 reached San Bernardino. There was no available crew east of San Bernardino except Las Vegas, and none west thereof nearer than Los Angeles. To have sent a crew from Las Vegas was futile, for that would only have extended the delay. There was no available relief crew at San Bernardino, the first terminal reached after Hesperia, and to have had one there it would have been necessary to send it from Los Angeles. Who could tell when the wreck occurred at Lugo, how long it would take to clear the line? The answer to that question only bears upon the question whether the information possessed by the defendant in respect thereto justified it in assembling a relief crew at Los Angeles and sending it forward to San Bernardino. The question is, of course, speculative, not being covered by the testimony.

But, we ask in all candor, after the train reached Hesperia, did the defendant know, or could have known, that the train could not reach Los Angeles within the 16 hour period. That too depends obviously upon the character of the information furnished to the defendant as to the time likely to be consumed in clearing the line. The train reached

Hesperia at 5:35 o'clock p. m. of the 4th. At that time the crew had been on duty 12 hours and 5 minutes. The schedule running time from that place to San Bernardino was 25 minutes, and from the latter to Los Angeles, 2 hours and 30 minutes. Therefore, the schedule running time of train No. 7 between Hesperia and Los Angeles (including the usual stop of 10 minutes at the latter point) was 3 hours and 5 minutes. Add to this 12 hours and 5 minutes for elapsed time, and the total is 15 hours and 10 minutes. Certainly the defendant knew when the train reached Hesperia that if it could depart therefrom within the next ensuing 50 minutes, it could reach Los Angeles within the 16 hour period; aye, presumably, it could have remained there for a further period of 30 minutes and still have reached the terminal within the statutory period.

It is, therefore, not clear how defendant could have sent a crew from Los Angeles to San Bernardino in time to relieve the crew of No. 7, even if it had been bound to do so.

Our argument directed to the preceding three counts applies with the same force to the instant counts, and will not be repeated.

Realizing, therefore, that the questions involved in this case overshadow any mere consideration of money, and concern most vitally the duties of the

carrier under the law, we submit the case believing the considerations herein presented warrant us in earnestly praying for a reversal of the judgment, at least so far as respects the causes of action herein considered.

Respectfully submitted,

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